CASE NO. 80-794

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CHARLES EDWARD BLEWS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS, FOURTH DISTRICT, STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case presented by Petitioner. Respondent also accepts Petitioner's Statement of the Facts to the extent that they are an accurate and non-argumentative recitation of proceedings in the trial court. However, Respondent reserves the right to present its own statement of the facts if this Court grants the writ and requires briefs on the merits.

ARGUMENT

Petitioner does not challenge the validity of the seizure of the films in this case, conceding the existence of probable cause and exigent circumstances therefor. His complaint is that after the seizure, the police did not procure a search warrant and a judicial determination of obscenity before viewing the films. As the issue is thus framed, Respondent maintains that Petitioner has failed to pose a substantial federal question which has not been decided in harmony with this Court's prior decisions.

In Heller v. New York, 413 U.S. 483 (1973), this Court considered the question of whether a judicial officer can issue a constitutionally valid warrant for a film's seizure without

first conducting an adversary hearing on the issue of probable obscenity. This Court held that an adversary hearing prior to seizure was unnecessary given the safeguards provided by New York's procedure, and the rationale of that decision is instructive for purposes of the instant case. Specifically, this Court pointed out that the film in Heller was not subjected to any form of "final restraint," in the sense of being enjoined from exhibition or threatened with destruction where a copy of the film was temporarily detained in order to preserve it as evidence. Id. at 490. In the instant case, the films were neither being exhibited nor were they seized for the purpose of their destruction, but rather their preservation as evidence.

Further, in Heller this Court stated the following:

> Petitioner made no pre-trial motions seeking return of the film or challenging its seizure, nor did he request expedited judicial consideration of the obscenity issue, so it is entirely possible that a prompt judicial determination of the obscenity issue in an adversary proceeding could have been obtained if Petitioner had desired. Although we have refrained from establishing rigid, specific deadlines in proceedings involving seizure of allegedly obscene material, we have definitely excluded from any consideration of "promptness" those delays caused by the choice of the defendant.
>
> * * * *
>
> ...If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an

> adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible.

Id. at 490-492 (footnotes omitted).

In the instant case, the seizure was not pursuant to a warrant, but it was nonetheless valid because, as Petitioner concedes, Officer Camarro was faced with one of the "now or never" situations alluded to by this Court in Roaden v. Kentucky, 413 U.S. 496, 505 (1973). Moreover, as in Heller, following the seizure, a prompt judicial determination of the obscenity issue was available at the request of Petitioner pursuant to §933.14, Fla. Stat.(1975)[Exhibit A], but he did not avail himself of it. The availability of this procedure was addressed by the Florida Supreme Court in the case of Rhodes v. State, 283 So. 2d 351(Fla.1973). In Rhodes, two films being

exhibited by the defendant were seized pursuant to a warrant issued without a prior adversary judicial hearing. The defendant's motion to suppress was denied, and the films were shown during trial, resulting in the defendant's conviction under the then-applicable Florida obscenity statute. On appeal, the defendant contended that there was not a prompt judicial determination of the obscenity issue, and after having cited §933.14, supra, earlier in its opinion, the Florida Supreme Court stated the following:

> Finally, the contention that there was not a proper and expeditious determination of the alleged obscenity is refuted by the fact of the immediate availability of a hearing on the obscenity question before the court which was at all times open for such a hearing. Appellant simply did not avail himself of it....

Id. at 358.

While §933.14 initially speaks in the context of a search warrant, it also addresses a situation where officers have taken property in the context of a probable cause search without a warrant or incident to a legal arrest, and it is clear that the provisions of the statute are available where a seizure is effected without a warrant. Cf. 1955 Op.Att'y Gen. Fla. 055-300 (November 9, 1955). Like the defendant in Rhodes, while Petitioner did file a motion to suppress, he never filed a motion for the return of the film or for a prompt judicial determination of obscenity pursuant to §933.14. As he points out in his Statement of Facts, he was arrested on a Tuesday, and the inventory of the films did not begin until the following

Monday. Even more time elapsed between the date of his arrest and the date of trial. Unlike the petitioner in Walter v. United States, ___U.S.___, 100 S.Ct. 2395 (1980), Petitioner herein had knowledge of the seizure from the first moment. Thus, he should not now be heard to complain that there was no prompt judicial determination of obscenity when such a determination was available to him upon request; nor does he here present a substantial federal question because the decision of the Fourth District Court of Appeal of Florida is consonant with this Court's decision in Heller v. New York, supra.

CONCLUSION

Based on the foregoing argument, Respondent respectfully requests that the instant Petition for Writ of Certiorari to the District Court of Appeal, Fourth District, State of Florida, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____day of_____, 1981, three copies of the Response to Petition for Writ of Certiorari were mailed to Roy E. Black, P.A., Attorney for Petitioner, at Suite 1402, 150 S.E. 2nd Avenue, Miami, Florida 33131.

_____
ROBERT L. BOGEN

APPENDIX

§933.14 RETURN OF PROPERTY TAKEN UNDER SEARCH WARRANT

(1) If it appears to the magistrate or judge before whom the warrant is returned that the property or papers taken are not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds upon which the warrant was issued, or if it appears to the magistrate before whom any property is returned that the property was secured by an "unreasonable" search, the judge or magistrate may order a return of the property taken; provided, however, that in no instance shall contraband such as slot machines, gambling tables, lottery tickets, tally sheets, rundown sheets or other gambling devices, paraphernalia and equipment, or narcotic drugs, obscene prints and literature be returned to anyone claiming an interest therein, it being the specific intent of the legislature that no one has any property rights subject to be protected by any constitutional provision in such contraband; provided, further, that the claimant of said contraband may upon sworn petition and proof submitted by him in the circuit court of the county where seized, show that said contraband articles so seized were held, used or possessed in a lawful manner, for a lawful purpose, and in a lawful place, the burden of proof in all cases being upon the claimant. The sworn affidavit or complaint upon which the search warrant

was issued or the testimony of the officers showing probable cause to search without a warrant or incident to a legal arrest, and the finding of such slot machines, gambling tables, lottery tickets, tally sheets, rundown sheets, scratch sheets, or other gambling devices, paraphernalia and equipment, including money used in gambling or in furtherance of gambling, or narcotic drugs, obscene prints and literature, or any of them, shall constitute prima facie evidence of the illegal possession of such contraband and the burden shall be upon the claimant for the return thereof, to show that such contraband was lawfully acquired, possessed, held and used.

EXHIBIT A